

**DEPARTMENT OF STATE REVENUE  
LETTER OF FINDINGS NUMBER: 03-0371  
Sales Tax  
For The Tax Period 1998-2000**

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**ISSUES**

**1. Sales and UseTax-Services**

**Authority:** IC 6-8.1-5-1(b), IC 6-2.5-4-1, IC 6-2.5-2-1, 45 IAC 2.2-4-2 (b),  
The taxpayer protests the assessment of sales tax on certain service charges.

**2. Tax Administration-Penalty**

**Authority:** IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the assessment of penalty.

**STATEMENT OF FACTS**

The taxpayer is a retailer of toys and associated items. The Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional sales and use taxes, interest and penalty against the taxpayer for the tax period 1998-2000. The taxpayer protested a portion of the assessment of tax and penalty and a hearing was held.

**1. Sales and UseTax-Services**

**Discussion**

The department assessed sales tax on the taxpayer's receipts from bicycle assembly and delivery charges. The taxpayer protests these assessments contending that they are nontaxable services. The Notice of Proposed Assessment is presumed to be accurate and taxpayers carry the burden of proving that a proposed liability is incorrect. IC 6-8.1-5-1(b).

Retail transactions made in Indiana are subject to sales tax. IC 6-2.5-2-1. A retail transaction is defined generally as the acquiring and subsequent selling of tangible personal property. IC 6-2.5-4-1. Sales of services are generally not retail transactions and are not subject to sales tax. There are, however, certain situations where services are subject to the sales tax.

The taxpayer sells bicycles and offers the buyers the option of an assembly service. Customers choosing to buy the assembly service first purchase the bicycle at the register in the normal manner. The customer is given a receipt including a line item for the bicycle assembly service and a pick-up date and time. After the bicycle is assembled, the customer picks up the bicycle.

The taxpayer also offers delivery service for its larger items such as swing sets. When purchasing a large item, the customer first pays for the item at the register as in any other transaction. A delivery fee is separately stated and included in the cost paid by the customer. The taxpayer contracts with an unrelated company for delivery of the item to the customer. If a problem develops after delivery of a large item, the taxpayer pays the delivery company to retrieve the malfunctioning item and deliver another to the customer.

The law governing the taxpayer's fact situation is very specific. To the extent service income represents "any bona fide charges which are made for the preparation, fabrication, alteration, modification, finishing, completion, delivery, or other service performed in respect to the property transferred before its transfer and which are separately stated on the transferor's records," the income becomes part of the retail merchant's gross retail receipts. IC 6-2.5-4-1 (e)(2).

The Regulations provide guidance on how to determine the taxability of a transaction at 45 IAC 2.2-4-2 (b) as follows:

(b) Services performed or work done in respect to property and performed prior to delivery to be sold by a retail merchant must however, be included in taxable gross receipts of the retail merchant.

In Taxpayer's situation, the services are performed prior to the delivery of the product to the customer. Sales tax must be collected on the total price of the finished product.

### **Finding**

The taxpayer's protest is denied.

## **2. Tax Administration-Penalty**

### **Discussion**

The taxpayer protests the imposition of the ten percent (10%) negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by

the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to reach and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The taxpayer argued that the negligence penalty was improperly imposed because the sales tax was not assessed on the bicycle assembly and delivery charges in the 1990-1992 audit. That audit, however, was an income tax audit. The taxpayer disregarded the department's instructions and was inattentive to its duties to collect and remit sales tax as required by Indiana law. These breaches of the taxpayer's duty constitute negligence.

### **FINDING**

The taxpayer's protest is denied.

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